

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2015/0257

BETWEEN:

TI CADEAU INC

Claimant

and

SAMPSON SAMUEL

Defendant

Appearances:

Mrs. Vanica Sobers Joseph of Geoffry Letang Chambers for the claimant
Mr. Darius Jones with Mr. Joshua Francis for the Defendant

2016: February; 17
July; 1

RULING

[1] **STEPHENSON J:** The claimant Ti Cadeau Inc. on 16th of October 2015 commenced legal proceedings against Sampson Samuel claiming the sum of \$76,339.00 being monies due and owing to the claimant pursuant to a promissory note entered into between the claimant and the defendant. The claimant also claims interest at the rate of 12% per annum from 30th November 2009 until payment of the sums due and owing pursuant to the said promissory note which was dated 1ST September 2009.

[2] By ex parte notice of application filed on 27th October 2015 the claimant applied for an order directing the defendant, his servants and or agents to immediately pay into court until the determination of the civil claim the sum of EC\$29,035.00 which was the proceeds of the sale of a portion of land in Concord. The claimant also further applied for an injunction restraining the defendant from using disposing or dissipating or otherwise dealing with the sum of \$29.035.00. An affidavit of Michael Pascal, the managing director sworn to on 27th October 2016 accompanied the application for the injunction.

[3] Mr. Pascal for and on behalf of the claimant averred *Inter alia that*:

- (1) the defendant along with one; Kaywana Sampson jointly and severally promised by virtue of a promissory note to pay to the claimant the sum of EC\$112,139.00;
- (2) to date the sum \$38,500 was repaid and that on numerous occasions the defendant made oral promises to pay off all or part of the debt by selling a piece of land located in Concord and applying the proceeds of such sale towards the debt owed to the claimant;
- (3) in spite of those promises and numerous demands made by the claimant the defendant has failed to pay the debt;
- (4) the claimant retained the legal services of Geoffrey L. Letang & Associates who wrote a demand letter to the defendant who still refused to pay the debt owed;
- (5) as a result of the defendant's refusal to pay the debt, legal proceedings were commenced against the defendant to recover the outstanding debt;

- (6) the claimant subsequently became aware that lands which he knew to be owned by the defendant were the subject of an agreement for sale which had been finalized and title has been issued in the name of a third party;
- (7) the said lands to the best of the deponent's knowledge was the sole asset owned by the defendant and the claimant fears that if the said monies were not held, that the defendant would dispose of the monies and that in the event that the claimant obtained a judgment, the judgment would remain unsettled and unpaid.
- (8) The claimant believed that in the absence of this interim order against the respondent there is a real risk that a judgment in its favour would remain wholly or substantially unsettled on the grounds that the applicant will utilize or dissipate the funds as soon as he gets it.

[4] The claimant provided the court with the usual undertaking for damages as is required by law.

[5] On 28th October 2015 a freezing order was granted by the court upon the claimant's ex parte application prohibiting the defendant from disposing with, dealing or dissipating the proceeds of the sale of the said land at Concord. A return date was fixed for the matter for 11th December 2015.

[6] The order of the court, a notice of return date and the application to continue the injunction were all duly served on the defendant on the 30th October 2015 as was evidenced by an affidavit of service filed on 2nd November 2015 were served on the defendant. It is noted that affidavits of service were also filed evidencing that the order of the court was also served on the Marigot Cooperative Credit Union and on other financial institutions on Dominica to wit: National Cooperative Credit Union, National Bank of Dominica, First Caribbean International Bank, Scotia Bank and the Central Co-operative Credit Union. The order was also served on

Alick Lawrence Chambers and allegedly on one Keywana Samuel the daughter of the defendant.

- [7] An appearance was entered on behalf of the defendant and a defence was filed. The defendant also filed an affidavit in opposition to the continuation of the injunction against him with exhibits.
- [8] In his defence to the claim filed on 22nd January 2016 the defendant denied owing the claimant as claimed. In his defence he further related the facts upon which he seeks to rely on in defence of the claim which states inter alia that he never signed any promissory note as stated.
- [9] The defendant also filed an affidavit in reply to the affidavit in support of the application for the injunction and the affidavit in support of the application to continue the said ex parte injunction.
- [10] The defendant averred that, the debt which the claimant is seeking to enforce was illegal, in that it arose out of a criminal complaint against his now deceased daughter who was once an employee of the claimant and who along with others were accused and charged with stealing a sum of money from the claimant.
- [11] That the promissory note which the claimant is seeking to rely on was never signed by him and is an illegal document in furtherance of a criminal objective to receive money from his now deceased daughter Kaywana Samuel to prevent her prosecution and the prosecution of the others and, in the circumstances he questions the veracity of the promissory note.
- [12] The defendant further averred that the claimant is guilty of non-disclosure in that he failed to indicate that the attorney who holds the proceeds of the sale for the land at Concorde is the same attorney who is acting for the applicant in the capacity as real estate agent. The defendant averred that counsel for the claimant

was acting as his agent in the sale of the land and that he the defendant gave the said attorney/real estate agent specific instructions to pay the proceeds of the sale of land to the Marigot Co-operative Credit Union on his behalf and the said attorney/real estate agent failed and or refused to follow his (the defendant's) instructions.

[13] The defendant further averred that the attorney for the claimant who is also his real estate agent has wrongfully retained the money rightfully belonging to him, which was for a specific purpose not connected with the case at bar.

[14] The defendant submitted that the interim injunction should be discharged on the ground of the material non-disclosure by the claimant in not disclosing that it was his solicitor who had conduct of the transaction of the sale of the land, and that the funds (*the proceeds of the sale*) were paid to his solicitor who is still in the possession of the said funds.

[15] The matter came up for hearing on the continuation of the *ex parte* injunction and learned counsel for the claimant Mrs. Vanica Sobers Joseph made submissions to the court as to why the injunction should be continued. Learned Counsel Mr. Darius Jones appearing for and on behalf of the defendant opposed the application for the injunction to be continued and submitted that the injunction should be discharged. The court has considered both set of submissions and will deal first with the application for the continuation of the injunction and thereafter I will deal with the submissions made that the injunction should not be continued but discharged.

[16] Learned counsel for the claimant grounded her submissions on the Court of Appeal in the matter of **Lucita Angeleve Walton et al –v- Leonard George de la Haye** ¹ stating that the defendant's allegation of material non-disclosure is fallacious as the facts which the defendant alleged were not disclosed to the court

¹ BVIHCVAP2014/004

were in fact disclosed to the court by the applicant's solicitors. That there was no attempt by the solicitor appearing in court to hide the fact of the involvement of another member of the claimant's solicitors firm.²

[17] Learned counsel for the claimant further submitted that if the court were minded to find that the claimant was in fact guilty of non-disclosure as alleged that said non-disclosure would not be fatal. Counsel relied on the statement of the learned Justice of Appeal in the **Lucita Angeleve Walton et al –v- Leonard George De La Haye**³ who said that “it is not for every omission that the injunction will automatically be discharged” and further that the discharge of an injunction for non-disclosure should not be carried to extreme lengths”⁴

[18] Learned counsel Mrs. Sobers Joseph also submitted that based on the contents of the defence filed there is a serious issue to be tried and submitted that if the court was not minded to continue the injunction that the court may consider an order that the money be paid into court pending the hearing and outcome of the substantive matter.

[19] Learned counsel Mr. Darius Jones grounded his application for discharge of the injunction on the following grounds:

- (1) That the claimant failed to make full and frank disclosure on the ex parte application;
- (2) That there is no serious issue to be tried as the claimant is seeking to rely on a promissory note that is unenforceable because of illegality;
- (3) That in any event damages are an adequate remedy in the case at bar.

[20] Learned Counsel Mr. Jones accepted the court's suggestion that there is a triable issue that is, on the legality and enforceability of the promissory note.

² Counsel's submissions to the Court

³ Op cit

⁴ Para 15 of the Judgment in Lucita Angeleve Walton –v- Leonard George de la Hay op cit

Court's considerations

- [21] It is clear from the documents filed and from the hearing of the matter thus far before the court, that the solicitors – the principal partner in the firm representing the claimant was the solicitor representing the defendant in the sale of the land at Concord, the proceeds of which are the centre of this application
- [22] The Court notes with interest that appended and exhibited to the defence which has been filed in the matter, is a document addressed to Mr. Geoffrey Letang in 31st March 2015 where he was instructed by the defendant to deliver the proceeds of the sale payable to him to the Marigot Cooperative Credit Union. It is noted that the funds were to be paid to the Credit Union and not to a specific account which suggests the Credit Union was to be the beneficiary of the payment. It is noted that these instructions predated the commencement of this matter.
- [23] This court recalls that at first the hearing of this matter, that is, when the ex parte application was made for the injunction, it became clear to the court that the chambers of the solicitor for the claimant was the very same office involved in the sale of the property and that the proceeds of the sale of the property had in fact come into and remained in the hands of the solicitor at said chambers, this was confirmed by Mrs. Sobers Joseph who had conduct of the matter on that day.
- [24] This court finds it interesting that in his affidavit in support of the ex parte application for the interim injunction the claimant did not aver to this fact nor that it was his solicitor who was involved in the sale transaction neither does he append the letter of demand which his solicitor sent to the defendant, he however does append the letters which he wrote to the defendant. This I find to be material in painting the entire picture before the court. When one looks at the document appended to the defence it was signed for by the solicitors' office in March 2015 which is some six months before legal proceedings were instituted against the defendant.

- [25] This court has from the very first day expressed grave concern about what appeared to be something not quite right about the transactions before the court and what appeared to be the involvement of the same chambers on both sides of the transaction.
- [26] This concern is further concretized by averments of the defendant in his affidavit and his defence with its exhibits.
- [27] The remedy which the claimant is seeking to enforce is an equitable remedy and it is a well-known maxim of law that “he who comes to equity must come with clean hands”.
- [28] Has the claimant through his solicitors on record come before this court with clean hands? Based on the evidence before this court it would clearly seem not.
- [29] The question was asked during the hearing of the matter whether the claimant can be held responsible for what appears to be conflict of his solicitor, Mr. Geoffrey Letang? As it is clear from the matter before the court that Mr. Letang was acting in the sale for the defendant having received the proceeds of the sale and having been instructed by the defendant to pay out the proceeds of the sale to the Marigot Co-operative Credit Union. This prompts a further question didn't Mr. Letang have a fiduciary duty towards the defendant acting in that capacity?
- [30] It is noted that in the face of those instructions (instructions from the defendant to pay out the funds received to the Credit Union) his chambers commenced legal proceedings on behalf of the claimant against the defendant. Doesn't this whole scenario taint the proceedings? I dare say it does. The court takes note of the letter from the Chambers of Alick Lawrence to Mr. Letang regarding the matter, which letter was exhibited to the defence filed by the defendant.

[31] The defendant brought to the attention of the court in his affidavit and quite correctly so I believe, that the claimant failed to inform the court that the funds which he was seeking to seize was in his solicitor's hands. This to my mind further taints the entire transaction as it regards the injunction. The question is to be asked in the round, taking the entire circumstances into consideration does this claimant come to equity with clean hands as he is expected to. I think not.

[32] On the balance of probabilities has the defendant established to the court, that the injunction granted herein should be discharged, based on the non-disclosure by the claimant which to my mind has tainted his application? The court is required to determine whether or not the non-disclosure by the claimant is of sufficient materiality to justify immediate discharge of the order without examination of the merits. **Re: Ipoc International Growth Fund Limited –v-LV Finance Group Limited et al**⁵

[33] Learned Counsel Mrs. Sobers Joseph submitted that not every disclosure results in the ex parte injunction being discharged as was stated and held in the **Lucita Angeleve Walton et al –v- Leonard George De La Haye**⁶.

[34] This court also finds there is material non-disclosure by the claimant in his ex parte application. What therefore should the court do in these circumstances?

[35] Where it is accepted by the court that there is a material non-disclosure on the part of the applicant who has obtained an ex parte injunction, the court can discharge the said injunction without going into the merits of the claim.⁷

[36] I accept the applicable principles as adumbrated by Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe et al**⁸ and applied by the Court of Appeal in the **Walton**

⁵ BVIHCVP2003/0020 and 2004/001 per Gordon JA at Page paragraph 37

⁶ Op cit

⁷ Re: Ipoc Internatinoal Growth Fund Limited –v- LV Finance Group Limited BVIHCVP2003/0020 and 2004/001

⁸ [1958] 3 ALL E R 188

Case⁹. Blenman JA repeated and relied on the applicable principles as summarized by Ralph Gibson LJ in **Brink's-Mat**¹⁰ as follows:

- “(a) the claimant must make a full and fair disclosure of all material facts;
- (b) materiality is to be decided by the court, not by the claimant or his legal advisers
- (c) proper inquiries must be made before making the application and the duty of disclosure applies not only to facts known to the claimant but to those which he would have known if he had made proper inquiries;
- (d) the extent of the inquiries which are necessary must depend on the nature of the case, the probable effect of the order on the defendant, the degree of legitimate urgency and the time available for making inquiries;
- (e) the court will be astute to ensure the claimant is deprived of any advantage he may have derived by his breach of duty;
- (f) whether the undisclosed fact is sufficiently material to justify immediate discharge of the order without examination of the merits depends on its importance; the fact the nondisclosure was innocent, in the sense that the fact was not known to the claimant or not perceived to be relevant, is an important consideration, but not decisive, because of the need to make proper inquiries;
- (g) there is a discretion to continue the order, or to grant a new one on terms notwithstanding proof of material non-disclosure. The discretion is to be ‘exercised sparingly’ but the application of the principle should not be ‘carried to extreme lengths.’”

[37] *Slade L.J. continued:*

“I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the **R v Kensington Income Tax Comrs**¹¹ principle as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.”

[38] In the **Brinks Mart case** Balcombe LJ said that when the court is asked to grant relief ex parte it is imperative that the applicant should make full and frank disclosure of the facts known to him or which should have been known to him had

⁹ Op cit

¹⁰ Op cit

¹¹ [1917] 1 KB 486 at page xxxxx

he made all the inquiries which were reasonable and proper in the circumstances¹². He went on to say

“The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see **R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac** (op cit). But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty.”¹³

- [39] Balcombe LJ went on to say that the discretion is to be exercised sparingly.
- [40] It is important for the court in deciding whether or not to exercise its discretion to resolve whether those facts which were not disclosed are sufficiently substantive to give reason for immediate discharge of the injunction without examination of the merits.¹⁴
- [41] Therefore, the issue to be decided in the case at bar is upon consideration by the court to consider whether the claimant failed in its obligation to make full and frank disclosure in its ex parte application for the injunction in such a manner as to require revocation of the said ex parte order.
- [42] Further consideration should be given to whether the claimant has shown a good arguable claim to be beneficially entitled to the proceeds of the sale of the property at Concord; If the claimant fails in its obligation to make full and frank disclosure on a material issue and fails to show the court that it has a good an arguable case that it is beneficially entitled to the funds from the sale then the injunction should be discharged.

¹² [1988] 3 All ER 188 at page 194

¹³ ibid

¹⁴ **Ipsc Internation Graowth Fund Limited** op cit

- [43] The funds subject of the injunction is proceeds of the sale from the defendant's sale of his land at Concord. The sale has been completed and is now in the hands of the solicitors for the claimant, they, having acted on behalf of the defendant in the sale. The claimant claims to be possibly entitled to the said money because he has a case against the claimant for breach of contract in totally unrelated circumstances.
- [44] The claimant contends that if the injunction is discharged there is the likelihood that if he is successful in his claim against the defendant it will not be able to recover the fruits of his judgment.
- [45] The defendant on the other hand says that there is no likelihood that the claimant will succeed in his claim against him as the claim is based on an illegal contract which is not enforceable against him. That in the circumstances apart from the non-disclosure on the part of the claimant the claimant will not be able to pass the second test in order for the injunction to be continued.
- [46] The law is the claimant must establish a good arguable case¹⁵, namely a case 'which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success¹⁶
- [47] The court is not required to resolve factual disputes on which the claims of either party may ultimately depend nor decide difficult questions of law which call for detailed argument and mature consideration.¹⁷

¹⁵ *The Niedersachsen* [1984] 1 All ER 398 at 414–415, [1983] 1 WLR 1412 at 1417, CA.

¹⁶ *ibid*, at 605 per Mustill J.

¹⁷ *Derby & Co Ltd v Weldon* [1990] Ch 48 at 57D-H, [1989] 1 All ER 469 at 475c-g.

[48] The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

Conclusion

[49] I am minded at this time not to continue the interim injunction granted herein.

[50] Which brings me to the second issue: Can the court in the alternative order that the funds be paid into court pending the hearing and outcome of the matter?

[51] The court is of the reserved view that to order that the monies subject of the injunction be paid into court would amount to an injunction in that the defendant would still be denied the use of his money and would defeat the purpose of discontinuing the injunction. Therefore the court will not accede to this request by counsel for the claimant.

[52] The court's order is therefore that the application to continue the exparte injunction is not granted and the exparte injunction granted herein is discharged. Costs to the defendant in the sum of \$750.00

[53] The court wishes to apologize to counsel and the parties for the delay in delivering this ruling.

M E Birnie Stephenson
High Court Judge